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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARK JOSEPH SHOLTIS,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

In arguing that the procedures utilized by the trial court provided due process to the Petitioner, Mr. Mark Sholtis (hereinafter "Mr. Sholtis"), the Respondent State of New Jersey (hereinafter "the State") merely highlights the existence of a conflict between the decision of the New Jersey Supreme Court in the instant case and the District of Columbia Court of Appeals in *Ford* v. *Turner*, 531 A.2d 233 (1987), and the existence of a conflict between the decision of the New Jersey Supreme Court in the instant case

and the due process principles underlying decisions of this Court. Indeed, the State nowhere asserts that there is no conflict between the decision of the New Jersey Supreme Court in the instant case and the decision of the District of Columbia Court of Appeals in *Ford* v. *Turner*, *supra*. Thus, the State's contentions merely emphasize the desirability of this Court's granting Mr. Sholtis' petition.

REASONS FOR GRANTING THE PETITION

(1)

Because the Procedures Approved by the New Jersey Supreme Court Do Not Provide the Kind of Notice of Hearing that the District of Columbia Court of Appeals, in a Firearms Forfeiture Case, Required for Constitutional Adequacy, this Court Should Resolve That Conflict

The decision of the New Jersey Supreme Court in the instant case asserts that "the proceedings in this case furnished sufficient procedural due process to the property owner . . . ." 127 N.J. 84, 90, 602 A.2d 728, 731. In support thereof, the State argues that the "course of the . . . proceedings" in the trial court gave Mr. Sholtis "actual notice" of the forfeiture. Brief In Opposition To Petition For Writ of Certiorari (hereinafter "Opposition Brief") at 4. Thus, the State contends that the notice component of the Due Process Clause of the Fourteenth Amendment was satisfied in the instant case. But in *Ford* v. *Turner*, *supra*, 531 A.2d at 237, the District of Columbia Court of Appeals in 1987 expressly rejected "actual notice" as necessarily being sufficient to satisfy the requirements of due process, and unequivocally held that "actual notice . . . does not imply that [the property claimant] received constitutionally adequate notice." The District of Columbia Court of Appeals emphasized

that "actual notice" was insufficient to support a forfeiture of firearms because "in no respect was [the property claimant] informed of a particular statutory right to contest the government's retention of the seized items at a hearing . . . ." *Ford*, 531 A.2d at 238.

Mr. Sholtis agrees that the procedures utilized to forfeit property need not be established by statute but may be established by the judiciary, as the State argues it has done. Opposition Brief at 6. This does not, however, relieve the State of the duty to provide notice "that certain property has been seized, that [the State] sought to retain the property pursuant to specific authority, and that a claimant could take particular steps to challenge [the State's] action." *Ford*, 531 A.2d at 238. In other words, the State may not require a property claimant to guess at the timeliness and type of procedures available to avoid forfeiture of his property.

While the decision of the District of Columbia Court of Appeals is consistent with the principles underlying decisions of this Court, the decision of New Jersey Supreme Court in the instant case is not. For example, in considering the constitutionality of notice given to a welfare recipient upon termination of welfare benefits, this Court approved the adequacy of the notice only because the recipient was "told the legal and factual bases for the [Welfare] Department's doubts." *Goldberg* v. *Kelly*, 397 U.S. 254, 268 (1970). Thus, not only does there exist an unmistakable conflict between the decision of the New Jersey Supreme Court and that of the District of Columbia Court of Appeals on the question of what constitutes constitutional adequacy of notice, but there also exists a

conflict between the decision of the New Jersey Supreme Court and a decision of this Court on the same constitutional question.

(2)

Because the Procedures Approved by the New Jersey Supreme Court Do Not Provide the Kind of Hearing that the Principles Underlying This Court's Decisions Require For Constitutional Adequacy, This Court Should Settle This Important Question of Federal Constitutional Law

Although the State does not dispute the fact that the actual hearing in the trial court was held for the sole purpose of considering Mr. Sholtis' application for admission into New Jersey's Pre-Trial Intervention (hereinafter "PTI") program (Opposition Brief at 4), the State asserts that this hearing was a constitutionally adequate substitute for a forfeiture hearing because Mr. Sholtis "was heard both orally and in writing, with no constraints placed on the issues he might have chosen to pursue; and had representation by counsel throughout the proceedings." Opposition Brief at 4-5. In the same vein, the State also asserts that Mr. Sholtis "was invited to write a brief at the trial level raising any issues he cared to raise." Opposition Brief at 6. However, because the hearing was for the sole purpose of determining whether Mr. Sholtis should be admitted into the PTI program, the only action taken at the hearing by the trial court regarding forfeiture of the firearms was to reserve decision on whether Mr. Sholtis' signing of the firearms release should be a condition of his admission into the PTI program, an action taken only because of the trial court's expressed concern for the "comity problems here . . . ." Appendix at 10a. The trial court otherwise agreed with the State that New Jersey law

mandated forfeiture without any additional proceedings. Appendix at 10a. As a consequence, no testimony was presented by the State or by Mr. Sholtis, and the actual brief-writing invitation by the trial court was to submit a brief solely on the "comity problems here . . . ." Appendix at 10a. Never in the context of any forfeiture procedures was Mr. Sholtis invited to contest any issues of fact for the purpose of avoiding the impending forfeiture.[1]

The general constitutionally required due process standard for hearings involving final deprivation of property rights is that they must be "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). In expanding upon the "meaningful manner" principle, this Court has held, in the context of termination of welfare benefits, that this principle requires that a person whose benefits are to be terminated is akin to a property claimant and as such must be provided with "an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally." *Goldberg*, 397 U.S. at 267-8. Moreover, "this Court [has] voiced the doctrine that '[w]herever one is assailed in his person or his property, there he may *defend*,' *Windsor* v. *McVeigh*, 93 U.S. 274, 277 (1876)." *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971) (emphasis added). Plainly, one can "defend"

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[1] As the District of Columbia Court of Appeals in *Ford* v. *Turner*, *supra*, did not reach the issue of what procedures, in addition to adequate notice, were required for a constitutionally adequate hearing, *Ford*, 531 A.2d at 244, the remaining portion of this brief will focus only on the conflict between the decision of the New Jersey Supreme Court in the instant case and decisions of this Court.

only if one is a party-defendant (or respondent) and allegations are made, and proof is presented, by a party-plaintiff (or petitioner).

In the context of a property forfeiture, this Court has held that "a forfeiture proceeding is quasi-criminal in character." *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965). It logically follows that a forfeiture proceeding must be conducted in a manner similar to a criminal proceeding; i.e., the State must *initiate* a formal proceeding specifically for the purpose of forfeiture[2] at which it bears the burden of proof, a burden in which the degree of proof may admittedly be less than "beyond a reasonable doubt." *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1984). Indeed, it has been the continuing underlying assumption of this Court's forfeiture jurisprudence that, to forfeit property, a proceeding similar in form to a criminal proceeding is the historically established norm. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84 (1974) (reviewing historical development of substantive and procedural forfeiture law).

In view of the constitutional due process principles established by this Court's decisions, it is evident that the severely truncated process approved of by the New Jersey Supreme Court does not comport with those principles, even assuming *arguendo* that no constraints on the process for avoiding forfeiture had been placed on Mr. Sholtis and that *he* could have

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[2] In *One 1958 Plymouth Sedan*, for example, the Commonwealth, pursuant to state statute, filed separate petitions for forfeiture of an automobile and of liquor. 380 U.S. at 694, n. 3.

raised any issues he wished. As a consequence, this case presents an important question of federal constitutional law to which the decisions of this Court, while establishing underlying principles, have not directly spoken—namely, the standards of procedural adequacy governing property forfeiture hearings. Thus, it is desirable for this Court to settle this question by determining the important issue of what "manner" of hearing is "meaningful" in the context of property forfeiture.

This case presents an appropriate opportunity for this Court to address that question—since the New Jersey Supreme Court approved, as being constitutionally adequate, a hearing in which no specific allegations regarding the forfeiture were made by the State and no evidence, let alone witnesses, was presented by the State to support those allegations.

CONCLUSION

Because a forfeiture of property implicates a fundamental constitutional right, this Court should grant Mr. Sholtis' petition, in order to resolve the evident conflict between the decision of the New Jersey Supreme Court in the instant case and the decision of the District of Columbia Court of Appeals in *Ford* v. *Turner*, *supra*, and to resolve the evident conflict between the decision of the New Jersey Supreme Court in the instant case and the due process principles underlying this Court's decisions, and thus to settle important questions of federal constitutional law.

Respectfully submitted,

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August, 1992